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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERT VINCENT INIGO, Appellant.	2 CA-CR 2009-0113 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083106

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 Robert Inigo appeals from his conviction and sentence for possession of a dangerous drug. He claims the trial court erred in denying his motion to suppress evidence, arguing the evidence was seized as the result of a nonconsensual search. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Inigo's conviction and sentence. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On August 23, 2007, Tucson police officer Douglas Marcotte was providing security, in uniform, for the city's Sun Tran Ronstadt Transit Center. Witnesses had informed Sun Tran personnel that Inigo and another man were offering to sell drugs to people getting off the buses. A Sun Tran employee alerted Marcotte, who then spoke with a witness, S. S. identified Inigo and another man as the two who had offered to sell her yellow pills.

¶3 Marcotte approached Inigo, who was seated on a bench. The officer said, "I'm being told by witnesses that you were trying to sell some pills to people exiting the bu[s]es. . . . Certainly you wouldn't mind showing me the contents of your pockets to show that you're not that guy." Inigo responded by jumping to his feet and angrily stating, "How dare you . . . accuse me of this." He threw at Marcotte's feet the contents of his pockets, which included yellow pills. Marcotte recovered five of those pills and arrested Inigo. Subsequent laboratory analysis indicated the pills contained Clonazepam, a dangerous drug. *See* A.R.S. § 13-3401(6)(c)(xi).

¶4 The state charged Inigo with one count of possessing a dangerous drug. *See* A.R.S. § 13-3407. Inigo moved to suppress the evidence of the pills, claiming Marcotte's invitation effectively demanded that Inigo submit to a warrantless nonconsensual search that violated the Fourth Amendment to the United States Constitution. The trial court denied his motion, concluding Inigo had consented to the search.

¶5 After a two-day trial, a jury found Inigo guilty. The trial court sentenced him to an enhanced, presumptive term of ten years' imprisonment. This timely appeal followed.

Discussion

¶6 Inigo contends the trial court erred in denying his motion to suppress the evidence obtained from Marcotte's invitation that Inigo empty his pockets. He argues Marcotte's invitation was effectively a demand, and that Inigo's compliance with it was not consensual. He therefore concludes the resulting exchange was a search in violation of the Fourth Amendment. We review a trial court's denial of a motion to suppress evidence for an abuse of discretion. *State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008). In doing so, we consider only the evidence presented at the suppression hearing, viewing that evidence in the light most favorable to upholding the court's ruling. *Id.* We review the court's ultimate legal conclusions de novo. *Id.*

¶7 The Fourth Amendment prohibits unreasonable searches or seizures. Warrantless searches and seizures are per se unreasonable unless a recognized exception

to the warrant requirement exists. *Katz v. United States*, 389 U.S. 347, 357 (1967). "'A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.'" *State v. Olm*, 223 Ariz. 429, ¶ 5, 224 P.3d 245, 247 (App. 2010), *quoting United States v. Jacobsen*, 466 U.S. 109, 113 (1984). A search conducted pursuant to valid consent is one of those specifically established exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

¶8 A law enforcement officer may approach an individual and request consent to a search. *See Florida v. Bostick*, 501 U.S. 429, 431 (1992). For consent to be valid, it must not be "coerced, by explicit or implicit means, by implied threat or covert force." *Bustamonte*, 412 U.S. at 228. Whether such coercion exists is determined by evaluating the totality of the circumstances. *Id.* at 229. Relying on *Commonwealth v. Boyer*, 314 A.2d 317 (Pa. 1974), and *United States v. Vasquez*, 638 F.2d 507 (2d Cir. 1980), Inigo suggests Marcotte's invitation was coercive because it was not stated in the form of a question and was conveyed as a demand. Neither of those cases support his position.

¶9 In *Boyer*, officers stopped the appellant illegally and then, using a bullhorn, ordered him out of his car. *Id.* at 318. With his hand on his weapon, the chief of police approached the appellant and asked to see identification documents. *Id.* at 317. The Pennsylvania Supreme Court concluded that, when the officers thereafter asked the appellant if "'he would mind'" if they searched his car's console, they clearly implied the search would be conducted with or without his consent. *Id.* at 318. The appellant's consent, therefore, was not voluntary. *Id.*

¶10 Similarly, in *Vasquez*, officers arrested the appellant and "told him they were taking him to his home in order to arrest his wife," and "it was quite clearly presented to him as a fait accompli." 638 F.2d at 526-27. Upon arriving at his home, officers told him "that if he caused any problems on entering, physical force would be used." *Id.* at 527. The officers did not request his consent to enter. *Id.*

¶11 Unlike *Boyer* and *Vasquez*, nothing presented at the suppression hearing in this case suggested that Marcotte had coercively invited Inigo to empty his pockets. Unlike *Boyer*, there is no indication Marcotte had ordered Inigo to do anything before issuing the invitation. And, unlike *Vasquez*, there is no indication that Marcotte impliedly had threatened to use force. Inigo testified at the suppression hearing that he had felt Marcotte was demanding that he empty his pockets and believed "[Marcotte] was going to put [his] hands on [him.]" But he identified nothing about the surrounding circumstances to suggest his belief was reasonable. Rather, Inigo implied that his prior experiences with law enforcement had led him to believe Marcotte would arrest him if he "d[id]n't follow instructions." Thus, Inigo's own testimony belies his assertion that the circumstances were coercive. Moreover, Marcotte's use of the phrase "certainly you wouldn't mind" suggested to Inigo that whether Inigo "minded" emptying his pockets was a relevant consideration in the discourse—even if Marcotte did not phrase the observation as a question.

¶12 The totality of the circumstances therefore supports the trial court's conclusion that Inigo validly consented to Marcotte's invitation that he empty his

pockets. The trial court did not abuse its discretion in denying Inigo's motion to suppress evidence.

Disposition

¶13 For the foregoing reasons, we affirm Inigo's conviction and sentence.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge